

Appeal from a decision by the Director, Minerals Management Service, affirming the assessment of additional royalties due to underreporting of volumes of royalty-in-kind oil. MMS-89-0093-O&G.

Reversed.

1. Administrative Authority: Generally--Appeals: Jurisdiction--Judicial Review

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior.

2. Accounts: Payments--Oil and Gas Leases: Royalties: Payments

An attempt by MMS to assess a lessee with additional royalties based upon an alleged violation of a provision of the lease and reporting regulations in effect in 1980 and 1981 will be overturned where the record shows that although the lessee underreported volumes of royalty-in-kind oil, resulting in underbilling of the Government's contract refiner, the lessee did, in fact, deliver all required royalty-in-kind oil to or on behalf of the refiner during the period in question.

APPEARANCES: Tony O. Hemming, Esq., Universal City, California, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Washington, D.C., for the Minerals Management Service.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Texaco, Inc., has appealed from the March 1, 1991, decision of the Director, Minerals Management Service (MMS), denying an appeal and affirming the assessment of \$13,226.47 in additional royalties due to underreporting of volumes of royalty-in-kind (RIK) oil during the periods July through October 1980, and March 1981, under Federal lease No. 080-019301-C, located within the Mt. Poso Field North Unit, Kern County, California. At all relevant times this unit was under an operating agreement designating Shell Oil Company as unit operator.

Pursuant to section 205 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1735 (1988), the California State Controller's Office (State) audited royalty payments from Federal leases in California, including Federal lease No. 080-019301-C, for the period January 1, 1977, through January 31, 1983.

In a letter dated March 7, 1986, the State advised DeMenno/ Kerdoon (D/K), the refiner who, under Federal Royalty Oil contract 14-08-0001-18005, was designated to receive Federal royalty oil from the lease during the period in question, that based on its audit, it had made a preliminary determination that D/K had underpaid royalties in June-October 1980 and March 1981 in the amount of \$30,018. ^{1/} The letter stated that MMS was unable to bill D/K for its share of the royalty oil because of "Texaco's failure to report properly all sales of lease oil in certain months." The State provided D/K 30 days within which to "advise this office * * * of its concurrence or the specific reasons for its nonconcurrence." Apparently, D/K responded denying that additional royalty was due.

In a letter to D/K, dated February 12, 1987, regarding this same matter, MMS stated that "it appears that approximately 1,105 barrels of entitlement oil w[ere] neither reported nor delivered during the period of the [royalty] contract." It advised D/K that under the contract terms D/K was entitled to receive that oil or that D/K had the option of requesting a waiver of the right to receive the oil. MMS stated that a waiver could be requested by signing the letter in the space provided and returning the letter to MMS. The record contains no evidence of a response to this letter.

On April 27, 1987, MMS sent another letter to D/K revising its undelivered oil volume to 637 barrels by deleting the amount for June 1980 because records showed that based on an earlier Department of the Interior, Office of Inspector General audit, D/K, through its insurer, had paid the under

^{1/} In an Aug. 22, 1990, letter to MMS, Texaco explained that during this period it delivered its 12.989-percent share of the unit production of oil to Witco Chemical Corporation (Witco) and that Witco paid Texaco for its 11.365375-percent net working interest share only, and purchased the MMS share of 1.623625-percent royalty-in-kind from Sabre Oil Company. The letter further stated:

"Sabre Oil Co. and DeMenno/Kerdoon are the same company. The attached copy of a worksheet received from Witco is evidence of the volume received by Witco for the account of Sabre Oil Co. (representing the MMS royalty-in-kind share).

"It is Texaco's position that the delivery of the crude to Witco met the contractual obligation of Texaco to deliver the MMS R-I-K portion. Sabre surely was aware of its obligation to MMS and of its receipt of payment from Witco of its sale of the MMS royalty barrels to Witco. MMS surely was aware of its contract with Sabre for the sale of the royalty barrels to Sabre."

billed amount for the June 1980 volume. This letter again apprised D/K of its option to receive undelivered oil or to waive delivery by signing and returning the letter. D/K waived delivery by doing so.

By letter dated February 10, 1988, MMS Royalty Compliance Division informed Texaco that it had underpaid royalty in the amount of \$15,823.07 because Texaco had underreported sales volumes for the months July-October 1980 and March 1981, and "[a]s a result, MMS was unable to bill DeMenno/ Kerdoon for the correct royalty oil volume, and DeMenno/Kerdoon did not receive the correct royalty oil volume." MMS demanded payment from Texaco and issued a bill therefor. Texaco filed a timely appeal.

MMS and the State later determined that Texaco had been overbilled for the July 1980 sales month, and MMS reduced the total assessment to \$13,226.47. The Director's March 1991 decision denied Texaco's appeal and affirmed the assessment of the adjusted amount.

In its appeal before the Director, Texaco did not dispute the underreporting, but contended that the RIK oil had, in fact, been delivered, and it, therefore, was not liable for the underpayment.

The Director rejected that argument and concluded that "Texaco, as producer, underreported the volume of RIK oil delivered to the refiner, and therefore is liable for the resulting underpayment for the RIK production" (Decision at 4).

In its statement of reasons on appeal (SOR), appellant first argues that "the MMS has no authority to assess royalties due more than six years prior to the audit order" (SOR at 4). In support of this contention, appellant states that the assessment for the alleged underpayments resulting from the 1980 and 1981 underreporting is barred by the statute of limitations at 28 U.S.C. § 2415(a) (1988) requiring that actions for damages be brought within 6 years after the accrual of the right of action. Appellant further argues that the enactment of section 103(b) of FOGDRA, 30 U.S.C. § 1713(b) (1988), which requires records retention for no more than 6 years after records are generated unless the Secretary notifies the record holder that an audit has been initiated, supports the argument that 28 U.S.C. § 2415(a) (1988) limits MMS' authority to assess royalties due more than 6 years prior to the audit order.

[1] We reject these arguments. This Board has previously held that statutes of limitations may apply to judicial enforcement of administrative actions, but not to the underlying administrative actions. Benson-Montin-

Greer Drilling Corp., 123 IBLA 341, 352, 99 I.D. 115, 121 (1992); Anadarko

Petroleum Corp., 122 IBLA 141, 147 (1992), and cases cited therein. Also section 103(b) of FOGDRA is not a statutory bar to all claims relating to facts occurring more than 6 years prior to the institution of an audit.

Amoco Production Co., 123 IBLA 278, 281 (1992); Marathon Oil Co., 119 IBLA 345, 351 n.9 (1991); see United States v. Tri-No Enterprises, 819 F.2d 154, 158-59 (7th Cir. 1987), where the court held that a statutory 6-year record

maintenance requirement does not establish a statute of limitations; see also Phillips Petroleum Co. v. Lujan, 951 F.2d 257, 260 (10th Cir. 1991).

[2] Secondly, Texaco argues that it should not be liable for underpayment of royalties in connection with volumes of RIK oil that it actually delivered. Where correct deliveries have been made, appellant argues, the Government must collect payment from the refiner, as to do otherwise penalizes the lessee at the expense of the refiner, who in essence receives a windfall in RIK.

MMS, on the other hand, argues that, both by the terms of section 2(f) of its lease and applicable reporting regulations at 30 CFR 221.57 through 221.67 (1981), a lessee is responsible for correct reporting of RIK volumes, and must be held responsible for royalties due the Government where those royalties have not been collected from the refiner as a result of lessee's underreporting. ^{2/} The Government must be able to rely upon lessees' reporting, MMS argues, as it has no other way to correctly determine volumes of RIK oil for which it is due payment. Both appellant and MMS contend that the other's recourse is against the refiner.

Appellant argues that its contentions are supported by the Board's decision in Mobil Oil Corp., 107 IBLA 332 (1989). Mobil involved an assessment by MMS of late payment charges against that company based on a failure to report accurately and timely volumes of RIK condensate it had delivered to two refiners to whom the United States had sold its share of the production. Although MMS billed the refiners for the RIK production, it assessed late payment charges against Mobil for untimely reporting. The Board held that late payment interest charges could not be assessed against Mobil.

MMS asserts that the question the Board decided in Mobil was not who, as between lessee and purchaser, should be liable for payment to the Government for RIK where a producer/lessee underreports volumes, but whether a lessee is properly assessed late payment charges where it had underreported RIK volumes but deliveries were in fact made on time. In this case, unlike Mobil, MMS argues, it has charged Texaco for breach of its lease by underpaying royalties, rather than for late payment charges.

We find that the rationale in the Mobil case is controlling here. The demand letter issued by MMS, Royalty Compliance Division, was predicated on erroneous facts. In that letter, dated February 10, 1988, it charged that "DeMenno/Kerdoon did not receive the correct royalty oil volume," and the record shows that MMS expressly asked D/K whether it wanted to "take delivery of the undelivered oil" or waive the obligation to take delivery. As noted above, D/K waived delivery. Now, MMS admits, for the first time on

^{2/} Section 2(f) of the lease provides:

"At such times and in such form as the lessor may prescribe, to furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom and the amount used for production purposes or unavoidably lost; * * *."

appeal, that Texaco did deliver the proper amount of RIK oil. ^{3/} Therefore, the sole error by Texaco in this case was the filing of erroneous reports for the months in question.

In Mobil, the Board was interpreting the offshore late payment regulation, 30 CFR 218.150(d), ^{4/} and it concluded that

as to royalty taken in-kind, the purchasers of such, not the producers of the oil, are looked to by the Department for timely payment of the production purchased and late payment charges for untimely payments. Moreover, it stands to reason, as Mobil argues on appeal, that it is the "royalty-in-kind purchaser which had an obligation to pay the government for the production delivered" and that "if anyone profited from [Mobil's] misreporting, it was the royalty-in-kind purchaser who had possession of this oil for a period of months without having to pay for it" (Statement of Reasons at 3). [Emphasis in original.]

107 IBLA at 333.

The onshore late payment regulation, 30 CFR 218.102(c), contains identical language. Thus, under Mobil, the Department is to look to purchasers of RIK oil for late payment charges, as well as for underpayments. Neither the lease provision nor the regulations, cited by MMS as applicable to these facts, indicates otherwise. In this case, Texaco fulfilled its royalty obligation by delivering the proper volumes of RIK oil to or on behalf of D/K. Its error was a reporting error. We find no authority for requiring Texaco to pay the amount demanded by MMS as royalty.

We note, however, that in 1987, the Department promulgated a rule under 30 CFR Part 208--Sale of Federal Royalty Oil--that provides:

If MMS underbills a purchaser under a royalty oil contract because of a payor's underreporting or failure to report on Forms MMS-2014 pursuant to 30 CFR 210.52, the payor will be liable for payments of such underbilled amounts, plus interest, if they are unrecoverable from the purchaser or the surety related to the contract.

30 CFR 208.13(b). Under the language of that regulation, were it applicable in this case, MMS could proceed against Texaco for the underbilled amounts.

^{3/} "MMS does not dispute that Texaco delivered the proper amount of oil to the refiner" (Answer at 3).

^{4/} That regulation provides:

"(d) Late payment charges apply to all underpayments and payments received after the date due. These charges include production and minimum royalties; assessments for liquidated damages; administrative fees and payments by purchasers of royalty taken-in-kind; or any other payments, fees,

However, it could do so only if those amounts were unrecoverable from "the purchaser or surety related to the contract." In this case, rather than pursuing collection of underbilled amounts from D/K, MMS mistakenly informed D/K that it was entitled to receive the RIK oil which, in fact, had been delivered. MMS should have billed D/K, not Texaco.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Bruce R. Harris

Deputy Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

fn. 4 (continued)

or assessments that a lessee/operator/payor/permittee/royalty taken-in-kind purchaser is required to pay by a specified date. The failure to pay past due amounts, including late payment charges, will result in the initiation of other enforcement proceedings."